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Supreme Court, U.S.
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No. 96-1046

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

SERENE G. SHAPER,
Petitioner,
v.
ROGER W. TRACY,
Tax Commissioner of Ohio,
Respondent.

On Petition for a Writ Of Certiorari to the
Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Betty D. Montgomery
Ohio Attorney General
Jeffrey S. Sutton
State Solicitor
Counsel of Record
Simon B. Karas
Deputy Chief Counsel
30 East Broad Street
17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980

Counsel for Respondents

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STATEMENT OF THE CASE

For the most part, Respondent agrees with Petitioner's Statement of the Case. A few particulars however, merit comment. One, Petitioner mischaracterizes the parallel declaratory judgment action that she filed challenging the Ohio statutes. She claims that the prior action related only to future tax years, while this refund action related to prior tax years. Pet. pages 4-5. In the words of the Supreme Court of Ohio "[t]he tax years at issue in both appeals are the same." *Shaper v. Tracy*, 76 Ohio St. 3d 241, 242 (1996).[1]

Two, in attempting to bolster her due process claim, Petitioner asserts that the State requested the Ohio Supreme Court "to defer action on the declaratory action in favor of ruling in the refund track appeal." Pet. at 7. That is not true and nowhere appears in the record.

REASONS FOR DENYING THE WRIT

I. INTRODUCTION

There are three reasons why the writ should be denied. First, no federal question is presented. The decision of the Ohio Supreme Court is unmistakably based on the independent state law ground of res judicata. Pet. App. B at 2a. (Relying on two Ohio Supreme Court decisions, the Court held that "[l]itigation of the legal issues raised by

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[1]It is worth pointing out that the Petition omits the factual recitations of the Ohio Supreme Court's opinion, including this particular fact. Compare Pet. App. B at 2a with 76 Ohio St. 3d at 242.

Shaper's refund claims is barred by res judicata in the instant case.").

Second, the Ohio Supreme Court properly barred Petitioner from splitting her claims. "[T]he tax years at issue in both appeals are the same." 76 Ohio St. 3d at 242. And the prior declaratory judgment action decided the same issue presented here that the Commerce Clause does not preclude Ohio's taxation of Shaper's out of state bond interest. *Shaper v. Tracy*, 97 Ohio App. 3d 760 (1994), *app. denied*, 71 Ohio St. 3d 1477 (1995). That issue also has previously been presented to this Court, which denied Petitioner's attempt to obtain review of the Commerce Clause issue after she lost the declaratory judgment action in state court. *See Shaper v. Tracy*, __ U.S. __, 116 S. Ct. 274 (1995).

Third, contrary to Petitioner's suggestion, there is no substantial federal question presented by this case. The claim seeks to undo the settled practice of a significant majority of states that allows taxation of the interest from out of state bonds, while simultaneously exempting the interest from in state bonds. It also seeks to undo settled precedent that an investor in out of state bonds may not force the investor's state of domicile to forgo taxation of such interest. *Bonaparte v. Tax Court*, 104 U.S. 592 (1881). And it seeks to undermine the market participation doctrine. *See Reeves v. Stake*, 447 U.S. 429 (1980).

II. THE LOWER COURT DECISION RESTS ON AN INDEPENDENT AND ADEQUATE STATE GROUND.

A state court decision, premised on the law of res judicata of that state, contains an independent and adequate state ground for decision. *See Durley v. Mayo*, 351 U.S.

277 (1956); *see also Michigan v. Long*, 463 U.S. 1032 (1983). Nor is *Limbach v. Hooven & Allison Co.*, 466 U.S. 353 (1984), to the contrary. In that case, the Ohio Supreme Court relied on *federal* rules of issue preclusion. "Collateral estoppel, therefore, was applied as a matter of federal, not state, law." 466 U.S. at 361. In contrast, Ohio law of res judicata was applied in this case because of a prior state court holding rejecting the very same claims and issues.

Shaper seeks to evade that reality by arguing that Ohio engaged in a "shell game." Pet. at 19-21. But the problem here is one of Shaper's making. She exposed herself to the potential for a res judicata (or collateral estoppel) claim by bringing two claims rather than just one. Having sought two bites at the apple, she has no reason fairly to complain when a procedural device used to prevent claim splitting (res judicata) is turned against her.

This argument is also wrong as a matter of fact. Shaper asserts that Ohio argued in *Shaper I* that discretionary review of her initial declaratory judgment action should be declined in favor of this refund action, which carries an appeal as of right, and then argued that the refund action is barred because of the prior declaratory judgment action. In the very early stages of the declaratory judgment action, to be sure, Ohio did argue that a declaratory judgment should not be allowed due to the non-exhaustion of an available administrative remedy -- the refund action. But Ohio lost. The trial court denied Ohio's argument and allowed Shaper to proceed in both the refund and declaratory judgment actions. Pet. App. H, at 25-28. The issue was not raised by Ohio again.

Nor is there any support for Shaper's argument that the state law of res judicata should not apply. Shaper argues that different tax years were involved in the two cases, thus

trying to invoke the rule that res judicata does not normally apply to different tax liabilities. In the Ohio courts, Shaper self characterized the declaratory judgment action as relating to "future years," since she also sought an injunction. But the request for declaratory relief alone would have done the same thing. At any rate, res judicata "bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Twp*, 73 Ohio St. 3d 379 (1995), syllabus. Quite naturally, the declaratory judgment action could not be bifurcated into future years only, since it affected the same years that were involved in the refund action.

But even if different tax years were involved, collateral estoppel would still bar review. The legal issue sought to be presented was clearly presented in *Shaper I*. Once a party has fought out a matter in litigation with the other party, she cannot later renew that duel.

Nor is it relevant that the declaratory judgment process results in a discretionary appeal to the Ohio Supreme Court, while the refund procedure provides a direct appeal.

> The General Assembly, in enacting both a reassessment and a refund provision, provided alternative methods of appealing assessments. The legislature, though, did not intend to provide redundant methods of relitigation.

Superior's Brand Meats v. Lindley, 62 Ohio St. 2d 133, 136 (1980). Shaper elected to present the same question in alternate procedures at the same time. She thus undertook the risk -- now realized -- that the declaratory judgment might preclude the refund action.

Finally, there is no parallel to *Reich v. Collins*, 513 U.S. 106 (1994). Due process does not prohibit a state from utilizing res judicata (or collateral estoppel) to bar relitigation of previously decided claims and issues. And this case simply does not involve "efforts to thwart refunds which are legitimately owed." Pet. at 26. It just involves limiting the refund decision to one final process. In the last analysis, an independent and adequate state ground exists and certiorari should be denied on this basis alone.[2]

III. THE ALLEGED FEDERAL ISSUE IS NOT CERTWORTHY.

A. The Decision Below Does Not Conflict With Any Lower-Court Decisions Or Any Decisions Of This Court.

Even if Petitioner could overcome the existence of an adequate and independent state ground, she has not raised a certworthy federal question. Shaper does not even suggest that a lower-court conflict exists among the state courts on the issue presented. Indeed none does. In the more than one hundred years in which such legislation has existed, not one state court has found the scheme unconstitutional.

Nor, for that matter, has this Court ever indicated that the widely-accepted practice is unconstitutional. On the contrary, the Court in reviewing a similar legislative scheme adopted by the state of Maryland noted that "[w]e know of no provision of the Constitution of the United States which

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[2] It is unclear whether Shaper even presented the state courts with a federal due process claim to avoid res judicata, as opposed to a state law claim that application of res judicata would be unfair. The claim was never identified as "federal" and only the most casual references to "due process" were made below.

prohibits such taxation." *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881). Since then the Court has not altered this view by indicating that the Commerce Clause somehow limits a sovereign's authority to subsidize the raising of local capital in competition with its sister sovereigns. Pet. App. F at 18a-20a.

In the absence of any conflict concerning the validity of a statutory scheme in existence for more than a century, it is difficult to understand why the issue needs to be addressed now. Review of the issue certainly would not help the states. At least 37 states have legitimately relied on their previously unchallenged authority to tax out-of-state government obligations differently from in-state government obligations. Pet. at 8-9 n. 3. The significance of that reliance is difficult to overstate. Ohio's taxation of out-of-state bonds, for example, accounts for at least twenty million dollars ($20 million) in annual revenue. *See* Appendix at 1a.

Investors also rely heavily on this statutory scheme. As Shaper herself concedes, "there are literally trillions of dollars invested in in-state municipal bond funds and single-state municipal bond funds." Pet. at 9 n. 3.

Unable to point to a single decision from any jurisdiction to support an alleged "major uncertainty" among the states, Shaper is forced to rely exclusively on newspaper stories to support this point. However, the news articles fail on their own terms to advance the argument. At best, they confirm that this lawsuit has application to other states, hardly a unique circumstance. At worst, they confirm the widespread reliance that Ohio and other states have placed on the validity of this longstanding practice.

B. The Commerce Clause Does Not Prohibit The States From Taxing Interest On Out-of-State Government Securities Differently From Interest On In-State Government Securities.

The Ohio courts also correctly rejected the Commerce Clause claim -- in the earlier case. One failing in Shaper's argument is her assumption that state regulation of government participants in interstate commerce is subject to the same Commerce Clause scrutiny as state regulation of private participants in interstate commerce. As the lower court recognized (in the earlier case),

> A review of the case law developed by the United States Supreme Court demonstrates that the Commerce Clause has been directed at acts of a sovereign on behalf of its citizenry to improperly provide *its citizenry* with a competitive advantage over the *citizenry* of other states. . . . The instant action does not involve a taxation scheme whereby the citizenry of Ohio are provided with a competitive advantage over the citizenry of other states. Rather, the taxation scheme in the instant action benefits the state of Ohio itself. (citations omitted) (emphasis in original).

Pet. App. B at 6a-7a. *See Reeves*, 447 U.S. at 437 ("[T]he Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace.").

In arguing to the contrary, it is clear that Shaper argues too much. If adopted, Shaper's novel theory of

Commerce Clause discrimination would seemingly have equal application to differential taxation of Ohio municipal bonds relative to private bonds. That cannot be. Nothing in the text or underlying function of the Commerce Clause indicates that governmental bodies are compelled to compete with private business on the same terms in fulfilling the traditional governmental function of funding public works.

The "market participation doctrine" likewise protects this exemption. Under that doctrine, when the sovereign participates as a consumer or vendor in commerce, its proprietary actions as a market participant are exempt from Commerce Clause scrutiny. And that is so even though the sovereign's actions may provide economic advantages to some private businesses or individuals but not others. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves, 447 U.S. 429*; *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983).

Nor does a state's establishment of certain parameters on the conditions of those bonds, i.e., tax exempt status, in any way alter this conclusion. Shaper is simply wrong that the "market participation doctrine" does not apply merely because the state has utilized a tax measure as an incentive to market the bonds. The State is still the seller and issuer of the bonds.

New Energy Company of Indiana v. Limbach, 486 U.S. 269 (1988), is not to the contrary. In *New Energy*, the Court merely rejected the argument that the enactment of a tax credit scheme, affecting *private* purchases and sales of ethanol, constituted the acts of a market participant. In *New Energy* the *only* participation of the sovereign in the affected market was the enactment of a tax measure. The state neither purchased nor sold ethanol, and thus was not a

market participant. That plainly is not the situation here where the government is the issuer and seller of the bonds.

"The central rationale" of the Commerce Clause "is to prohibit state or municipal laws . . . that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." *C & A Carbone, Inc. v. Clarkstown*, __ U.S. __, 114 S.Ct. 1677, 1682 (1994). At issue in this case is a state practice that has withstood the test of time (subsidy schemes like this one first appeared at least 100 years ago), that has been widely accepted (at least 36 other states have similar measures), that Congress has long stayed its hand in interfering with, and that has not led to the "jealousies and retaliatory measures" among the states that the clause was designed to prevent. The Commerce Clause simply is not violated by this well-accepted practice.

CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

Betty D. Montgomery
Ohio Attorney General

Jeffrey S. Sutton
State Solicitor
Counsel of Record
Simon B. Karas
Deputy Chief Counsel
30 East Broad Street
17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980

Counsel for Respondents

January 29, 1997

COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Case No. 92CVH-11-9271
Judge Stratton

SERENE G. SHAPER,
Plaintiff,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,
Defendant.

AFFIDAVIT

STATE OF OHIO)
) :SS
COUNTY OF FRANKLIN)

I, Michael P. Sobul, being duly sworn, state that the following is true to the best of my knowledge and belief.

The Tax Analysis and Local Government Distributions Division (formerly the Research and Statistics Division) of the Ohio Department of Taxation houses the library and historical documents of the department. I am the Assistant Administrator of that division and have made the attached copies of the following documents stored there as official records:

1. A copy of the cover and first four pages of the Ohio Tax Study Commission Report 1967 to the 107th General Assembly.

2. An abstract from the Legislative Service Commission dated April 30, 1970, of the testimony by Dr. Frederick Stocker on March 17, 1970 to the House Ways and Means Committee.

3. A Memorandum dated December 16, 1992 from Dr. Frederick Stocker concerning his testimony in item 2.

In my capacity as Assistant Administrator, I also have access to and am responsible for working with the department's records of annual revenue derived and/or outstanding from state income tax. Accessing these records, I have determined that approximately twenty million dollars ($20,000,000.00) was derived and/or is outstanding from non-Ohio governmental obligation interest and dividends reported on Ohio income tax returns for year 1989.

Further, affiant sayeth naught.

/S/ Michael P. Sobul

Sworn to and subscribed in my presence this 17th day of December, 1992.

/S/ Lawrence D. Pratt
Notary Public

LAWRENCE DWIGHT PRATT,
Attorney-At-Law
NOTARY--STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C.